

an inmate is not enough to prove deliberate indifference, and this case followed the rationale and logic outlined in that ruling.

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Malpractice Action Stemming From Court-Ordered Independent Medical Examination

Medical Malpractice Claim in the Context of a Court-Ordered Independent Medical Examination Is Actionable According to the Supreme Court of Virginia

In the case of *Harris v. Kreutzer*, 624 S.E.2d 24 (Va. 2006), the Supreme Court of Virginia considered whether a cause of action for medical malpractice and/or intentional infliction of emotional distress existed in a case involving a claim brought by an evaluatee against a clinical psychologist who conducted a court-ordered independent medical examination (IME) of her. The court held that a cause of action regarding medical malpractice can exist, but the circumscribed nature of IMEs limits the duty solely to not causing harm to the “patient” in actual conduct of the examination. The court set a much higher bar to establish a cause of action under the guise of intentional infliction of emotional distress, pointing out that, among other things, the conduct of an evaluator must be “outrageous” and lead to distress “so severe that no reasonable person could be expected to endure it.”

Facts of the Case

Nancy J. Harris brought a personal injury suit in 1992, seeking damages for a traumatic brain injury that she alleged resulted from an automobile acci-

dent. The trial court granted her request and required her to undergo an IME pursuant to the Supreme Court of Virginia Rule 4:10, to determine the nature and extent of the alleged injury. Although she initially refused the “Rule 4:10 examination,” Ms. Harris later acceded to the examination, and the jury ultimately awarded her damages totaling \$419,769.66. She subsequently filed a motion for judgment against Dr. Kreutzer, the clinical psychologist who had examined her by order of the court, alleging medical malpractice, defamation, and intentional infliction of emotional distress arising from the IME conducted by him on January 19, 1996.

Regarding the claim of medical malpractice, Ms. Harris contended that Dr. Kreutzer, in undertaking the Rule 4:10 examination, owed a duty to her to exercise reasonable and ordinary care and to avoid causing her harm in the conduct of the examination. She argued that Dr. Kreutzer breached his duty by not complying with the applicable standard of care for his profession and claimed that he was “deliberately abusive” and acted “with disregard for the consequences of his conduct” which led her mental and physical health to drastically deteriorate. She noted specific examples of such conduct, alleging Dr. Kreutzer “verbally abused [her], raised his voice to her, caused her to break down in tears in his office, stated she was ‘putting on a show,’ and accused her of being a faker and malingerer.” She also contended that Dr. Kreutzer had prior knowledge of her underlying fragile health, citing traumatic brain injury from the automobile accident, being a victim of armed robberies with subsequent PTSD, and being suicidal.

Regarding the claim of intentional infliction of emotional distress, Ms. Harris claimed that Dr. Kreutzer’s conduct during the IME was “intentionally designed to inflict emotional distress upon [her] or was done with reckless disregard for the consequences when he knew or should have known that emotional distress would result.” She further claimed his conduct was “outrageous” and her subsequent emotional distress was “severe.”

Dr. Kreutzer filed a demurrer to the motion for judgment, specifically arguing that “a Rule 4:10 examination did not create a physician-patient relationship, so he owed no legally cognizable duty to Harris,” and thus there was “no claim for medical malpractice as a matter of law.” Furthermore, he stated that even if a physician-patient relationship

existed in such an examination, Ms. Harris failed to allege sufficient facts to constitute a breach of the standard of care required of a reasonable and prudent physician in his profession. He separately argued that Ms. Harris failed to allege facts that would support a claim for the tort of intentional infliction of emotional distress. The trial court granted demurrer to Dr. Kreutzer on all counts and dismissed Harris' motion for judgment with prejudice. Ms. Harris subsequently appealed only on the counts of medical malpractice and intentional infliction of emotional distress. The Supreme Court of Virginia agreed to hear the case on appeal.

Ruling and Reasoning

The court concluded that the trial court properly granted the demurrer as to Count III of intentional infliction of emotional distress, but it erred in granting demurrer as to Count I which denied a cause of action on the issue of malpractice. The court affirmed in part, reversed in part, and remanded the case for further proceedings in light of the ruling.

The court first explained the standard of review in this case brought under demurrer which "tests the legal sufficiency of a motion for judgment and admits the truth of all material facts that are properly pleaded." The court explained that it was only able to state whether a cause of action existed on Counts I and III.

Regarding Ms. Harris' claim of intentional infliction of emotional distress, the court succinctly relied on prior Virginia case law that found that liability for intentional infliction of emotional distress (under any circumstance, not just during an IME) "arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." The court found that Ms. Harris failed to allege injuries that "no reasonable person could be expected to endure," and that Dr. Kreutzer's alleged conduct was simply not of the "outrageous" nature required to support a claim of intentional infliction of emotional distress in Virginia. However, the court did not state that a court-ordered IME would bar cause of action for this tort, if sufficient facts supporting such a claim did in fact exist.

The court analyzed in detail the alleged Count I of medical malpractice, considering whether Dr. Kreutzer owed Ms. Harris a duty in conduct of the IME, and if so, what that duty entailed. The court first explained that it would use the term "physician" to include the clinical psychologist defendant for purpose of the anal-

ysis. The court based its analysis on Virginia's existing malpractice statutes and case law from other states. The court recognized that an IME did not on the surface appear to be a traditional, consensual physician/patient relationship from which would normally spring a duty, but reasoned that, when a physician agrees to conduct an IME, he "expressively consents" to a relationship with the "patient," and when a "patient" raises emotional harm as an issue, knowing that the court will order an IME, it is "implied" that the "patient" is consenting to a relationship with a physician for the purposes of court-ordered evaluation. However, the court reasoned that in the context of such a "strictly circumscribed" evaluation, "a Rule 4:10 physician's duty is limited solely to the exercise of due care consistent with the applicable standard of care so as not to cause harm to the patient in actual conduct of the examination." The court cited an example of malpractice stemming from such a scenario, in which a physician conducting an IME caused physical injury to an evaluatee during an examination, failing to exercise due care by rotating a previously injured "patient's arm and shoulder well beyond prescribed limits, injuring the patient and breaching the standard of care." The court emphasized that "liability is restricted to a breach of that duty only," and not for example, a duty to come to a medicolegal opinion that will avoid any future harm's coming to the evaluatee. To do so, the court cited, could lead to a "chilling effect" and "would make it impossible to find any expert witness willing to risk a lawsuit based on his testimony as to his opinions and conclusions before any tribunal."

Discussion

This case falls in line with other cases cited by the Supreme Court of Virginia that find a "circumscribed duty" of forensic evaluators to their evaluatees, but notes that the duty is specifically limited to not harming the evaluatee as a result of actual conduct of the examination. It should be emphasized that the court did not assign a duty to an evaluator to withhold opinions stemming from evaluations that could predictably result in an adverse disposition for the evaluatee. Nevertheless, assignment of any duty by the courts, however limited, opens the door to malpractice claims, and forensic evaluators should be aware that in certain jurisdictions, they are not strictly immune from malpractice claims stemming from court-ordered IMEs.

Fortunately, the court in the instant case gave due weight to the importance of a circumscribed

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duty severely curtailed from that duty's emanating from a traditional physician-patient relationship. Should other courts more liberally interpret the terms of forensic evaluators' duty to evaluatees, the very nature of forensic work could be altered in a manner contrary to the ability of evaluators to offer objective opinions that the courts desire.

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